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THE LOGISTICS LAWYER

FIRST QUARTER 2013

IT'S GOOD TO BE THE KING

A Cautionary Tale for Motor Carriers Hauling Goods for the Federal Government

By J.W. Taylor, Esq. and Bridgette M. Blitch, Esq.

Motor carriers need to be aware of how a centuries old legal doctrine can impact their ability to get paid for any transportation services they provide to the federal government. The doctrine, which was born in medieval Europe, is known as sovereign immunity. The doctrine has its roots in the feudal fiction that "the King can do no wrong." Even today, sovereign immunity is an established element of jurisprudence in all civilized nations. Boiled down to its essence, sovereign immunity means that the government cannot be sued without its consent.[1]

Motor carriers that transport shipments for the United States need to understand the specific steps to take in order to secure payment of freight charges from the government. Simply relying on a bill of lading that identifies the United States as the shipper and/or receiver is not enough. As seen

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PROTECTION UNDER THE PERISHABLE AGRICULTURAL COMMODITIES ACT

An Overview of PACA Trust Requirements

By Brian K. Mathis, Esq.[1]

In 1930, Congress enacted the Perishable Agricultural Commodities Act ("PACA") to "regulate the sale of perishable commodities and promote fair dealing in the sale of fruits and vegetables."[2] The purpose of PACA was to provide "protection for producers of [agricultural] commodities, most of whom must entrust their products to a buyer or merchant who may be thousands of miles away, and depend for their payment upon his business acumen and fair dealing."[3]

By 1983, however, Congress finally acknowledged that

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& LATEST NEWS

Congratulations to Jo Kirkland who received her Advanced Paralegal Certification (APC) for Business Structures and Entities. There are only 23 paralegals in Florida with this advanced certification. Jo is also a Florida Registered Paralegal (FRP) through The Florida Bar.

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in the case of Central Freight Lines, Inc. v. United States, 87 Fed. Cl. 104 (2009), the United States government makes liberal use of the sovereign immunity doctrine to avoid obligations alleged by motor carriers (and the rest of us) unless the motor carrier takes specific steps to obtain the federal government's consent to subject itself to a court's jurisdiction if it fails to pay.

Cases preceding Central Freight Lines left unsettled questions regarding whether the United States could be held liable for freight charges if it was named as a party to the bill of lading when the broker failed to pay. Also, before Central Freight Lines, no prior opinions addressed whether a broker licensed to arrange the transportation of shipments in interstate commerce under the authority of the Federal Motor Carrier Safety Administration ("FMCSA") could bind the United States to the payment of freight charges as an agent for the government. In an effort to bring clarity and finality to a poorly understood supply chain risk, the case of Central Freight Lines presented the authors of this article with an opportunity to address these unsettled before United States in the Court of Federal Claims (a court that hears monetary claims against the federal government). This article outlines the unique arguments presented, and explains how the court eventually ruled.

The case of Central Freight Lines began when the federal government (specifically the Department of Defense "DOD") entered into a series of Government Bills of Lading ("GBL") with Dispatch Services, Inc. (a licensed property broker under the FMCSA) for trucking services.[2] Acting as a broker, Dispatch Services hired Central Freight Lines, Inc. (a licensed motor carrier) to move shipments for the DOD. Unknown to Central Freight, Dispatch Services had actually been hired to transport the shipments for the DOD as a motor carrier, and was not authorized to broker or subcontract out the work to third-party motor carriers.

Dispatch nonetheless issued over 1,300 straight bills of lading to Central Freight, and directed Central Freight to move the freight (most of the bills of lading listed the DOD as both the shipper and consignee). Central Freight delivered the shipments and was due to be paid $175,000 from Dispatch. As often happens in this industry, Dispatch Services went out of business without paying Central Freight. Relying on principles of agency and transportation law, Central Freight sued the United States for non-payment of the transportation services.

The United States moved to dismiss Central Freight's complaint based on what amounts to be a claim of sovereign immunity. The United States claimed that only the Tucker Act (28 U.S.C. § 1491(a)(1)) grants the Court of Federal Claims jurisdiction to hear any claim against the United States. The Act requires the existence of an express or implied contract between the party seeking relief and the federal government. The United States claimed that the Tucker Act was the only vehicle by which it consented to be sued for express and implied contract claims (and by which it agreed to lower the protection of sovereign immunity). In the context of the claims brought by Central Freight, an express contract meant the existence of a contract between Central Freight, on the one hand, and the United States, on the other hand. An implied contract meant that Central Freight would be required to prove that Dispatch Services was an actual agent of the federal government tasked to procure transportation services. The federal government argued that neither circumstance was present, thus warranting a dismissal of Central Freight's claims for lack of jurisdiction against the United States under the doctrine of sovereign immunity.

Central Freight countered the government's arguments by first claiming that the straight bills of lading between it and Dispatch Services created an express contract between Central Freight and the United States (specifically, the Department of Defense). Citing Southern Pacific Transportation Co., v. Commercial Metals, Co., 456 U.S. 336, 343 (1982) (holding shippers and consignees liable for freight charges), Central Freight argued that because the DOD was listed as the consignee and/or shipper on the SBLs, the DOD was liable for payment of the transportation charges.

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Secondly, Central Freight contended that the United States was liable for the unpaid freight charges because Dispatch Services was a licensed broker and purchasing agent (i.e., a Transportation Service Provider) when it arranged for Central Freight to haul the federal government's loads. Therefore, as a broker and agent (see 49 U.S.C. § 13102(2) defining broker as "agent"), Central Freight claimed there was an implied contract between Central Freight and the United States sufficient to create jurisdiction under the Tucker Act.

Finally, Central Freight argued that Court of Federal Claims retained jurisdiction over its case because, Congress, through its enactment of 49 U.S.C. § 13706, provided a statutory basis for motor carriers to recover freight charges from shippers and consignees (even though no contract may exist between the motor carrier and shipper or consignee).

The Court of Federal Claims rejected Central Freight's argument under Section 13706, finding that Section 13706 does not provide a basis for jurisdiction on the United States where the subcontractor and the federal government were not parties to a contract for transportation services, specifically a GBL. The Court found that Section 13706 was not intended to amount to consent by the federal government to be sued over disputes involving itself and transportation subcontractors on any level. Thus, the Court found that sovereign immunity prevented Central Freight's claims from going forward against the United States.

The Court also rejected Central Freight's contention that Dispatch was a purchasing agent for the DOD because there was no evidence that Dispatch Services was authorized to act as a broker or as an agent of the United States. In fact, the Court found that Dispatch Services had only the legal authority to act as a motor carrier for the United States, not as a broker of such services. The Court pointed to the absence of any language creating an agency relationship between the United States and Dispatch Services in their GBL. The Court also recognized that nothing in the GBL between the United States and Dispatch Services or the straight bill of lading between Central Freight and Dispatch Services stated or even implied that the United States agreed to pay Central Freight for any of its transportation services. In the absence of contrary findings, the Court found no agency could be deemed to exist.

Furthermore, in the absence of a GBL between Central Freight and the United States, the Court found no contract between Central Freight and the United States could be deemed to exist (notwithstanding the fact that both bills of lading contained the same material terms and conditions). The Court held that there must be some evidence that the government intended to be bound by contract to Central Freight (i.e., by issuing a GBL to Central Freight, signing a SBL by a person authorized to bind the government, or by making Central Freight a party to the GBL's issued to Dispatch Services).

Based upon these findings, the Court granted the motion to dismiss of the United States. Central Freight was left with no avenue to recover the nearly $175,000 of transportation services it had provided efficiently and in good faith.

The resulting lesson learned from this case is that when motor carriers intend to haul loads where the United States is the shipper or consignee, specific steps must be taken to avoid the possibility of nonpayment. First, if the motor carrier intends to haul freight for the DOD, it must adhere to the Military Surface Deployment and Distribution Command Freight Carrier Registration Program. This program sets forth a detailed list of steps and requirements that a motor carrier must take in order to become a qualified TSP. Second, a motor carrier cannot rely on a straight bill of lading to establish a right to seek recourse against the government, even if the motor carrier is a TSP. Instead, the motor carrier must have a GBL directly with the United States if it hopes to secure payment from the federal government. Third, do not assume your broker (like Dispatch) is actually authorized to act as a broker or purchasing agent for the government. Instead, confirm that the motor carrier is independently licensed and authorized to transport shipments for the DOD. These

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precautionary steps are unique to the DOD. Other federal departments may have different requirements than those outlined in the DOD's Freight Carrier Registration Program, and you should consult with qualified counsel in attempting to navigate those requirements. &

[1] The United States, like other governments, allows itself to be sued under particular circumstances so that companies and private citizens will feel some sense of security in doing business with it and will have limited legal recourse if the federal government does not meet its obligations.

[2] GBLs are contracts between the government and a specific government-approved carrier, known as Transportation Services Providers ("TSPs"). See Dalton v. Sherwood Van Lines, Inc., 50 F.3d 1014, 1016 (Fed. Cir. 1995) ("[A GBL is] a document used by the federal government when acquiring freight transportation services from common carriers. Each GBL [is a] contract between the parties, establishing their respective rights with regard to the transportation services procured and provided.")

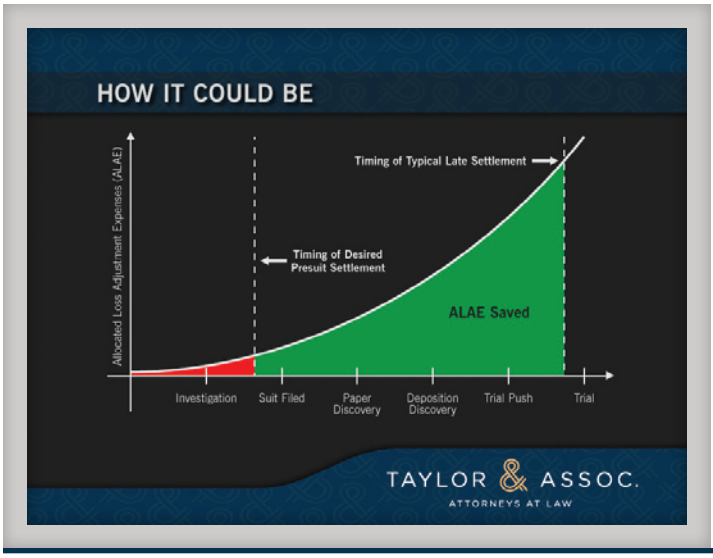
TAYLOR PRESUIT PROGRAM

The New Game In Town • By C. Robert Pickett, Esq.

A gambler's losses continued to mount, but he played on. When warned by a friend the card game was run by cheats, he said, "I know the game is crooked, but it's the only one in town."

Fleet owners and insurance companies can relate to the gambler. They are losing money with the routine late settlement of serious truck accident cases, but litigation timing is thought to be the only game in town. Not so with the presuit program we have created.

More than 90% of disputed liability cases are settled; very few have a feature that forces them to trial. We know settling cases late, when they could have been settled presuit, significantly wastes allocated loss adjustment expenses (ALAE).



We also know a large percentage of the late settlements could have occurred before suit was filed. So what is preventing claims managers from achieving more presuit settlements?

Knowing The Cards To Be Dealt

Managing serious truck accident cases is demanding. The ability to select the right case and manage it to a successful presuit settlement is limited by a major factor: information. The quality and timeliness of the liability information you receive affects your ability to make wise decisions.

To a large degree, you rely on your defense counsel and accident reconstructionist ("recon") working together to develop the liability defense and to provide you with the critical information you need. Yet the litigation system, with its open discovery, works to push development of this information back until just before trial. Valid strategic reasons exist for this timing in the litigation context. The defense wants to smoke out the plaintiff's liability case before shaping its own. Thus, the defense reconstruction analysis is usually finished just before the recon's deposition, which in turn is usually just before the trial. This late timing isn't going to help you choose the right case as a candidate for a presuit settlement. The late timing baked into the litigation system sets

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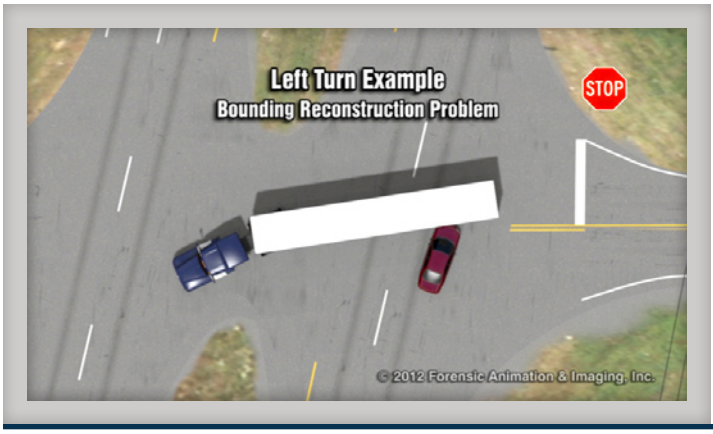
everyone's expectations. So late settlements have become the expected norm.

Also, the general business model of defense counsel and recons works against presuit settlements. The financial interests of those charging fees on an hourly basis do not align with fleet owners and insurance companies that want to reduce fees, which represent a large percentage of ALAE. Defense counsel and recons are professionals whose roles are largely defined by the litigation system. They are operating within the expected norm and may not be aware there is a way to develop the critical liability information needed to support presuit settlements.

Even those lawyers who may be receptive to presuit settlements do not have the specialized skills and technology needed to reveal and demonstrate the critical information about the controlling liability issue. Without this information, they cannot help you accurately evaluate liability exposure to determine a fair settlement range or develop a persuasive, visual presentation to move your bargaining opponent into that range. Let's examine a common accident fact pattern to show how our presuit program can extract reliable information by using specialized protocols and technology.

Below is a top view of a truck being hit after it turned left ahead of oncoming traffic. The truck stopped at the stop bar, then moved to a second stop position closer to the edge of the road to get a better view left. The truck driver saw the approaching car, but based upon having made this turn many times before, thought there was sufficient time to make the turn safely. The car hits him at the fifth axle.



With the information known shortly after the accident, we can "bound" the reconstruction problem to evaluate the avoidance options available to the approaching driver. Bounding looks at the range of accident scenarios as governed by the changing values for critical variables. For example, did the truck start at the stop bar, the lane line, or halfway between them? Was the truck's acceleration slow, average, or fast. See the table below for a list of other variables. One combination would be stop bar, average acceleration, rear trailer impact, for a car approaching at 55 mph, in the right lane.

These variables yield 144 different scenarios, from which we can choose the best match to our accident facts. We have then revealed the critical information about how much avoidance time was available to the approaching driver. Importantly, the bounding process does not require the support of a defense recon, although one may have been retained to preserve scene evidence.

BOUNDING RECONSTRUCTION PROBLEM
(Variables Yield 144 Scenarios)

Tractor Start	Tractor Acceleration	Trailer Impact	Car Speed	Car Lane
Stop Bar	Slow (.04g)	Front	50 mph	Left|Right
Lane Line	Average (.06g)	Middle	55 mph	Left|Right
Half Way	Fast (.08g)	Rear	60 mph	Left|Right

The approaching driver's avoidance opportunity is shown in the image below. This image depicts the start of hard braking that will enable the car to come to a full stop without hitting the trailer. No reasonable driver would have ignored the truck's movement across the lanes and started braking so late. The variables governing this scenario are clearly shown by information window at the bottom of the image or the motion of the vehicles in the accident environment.

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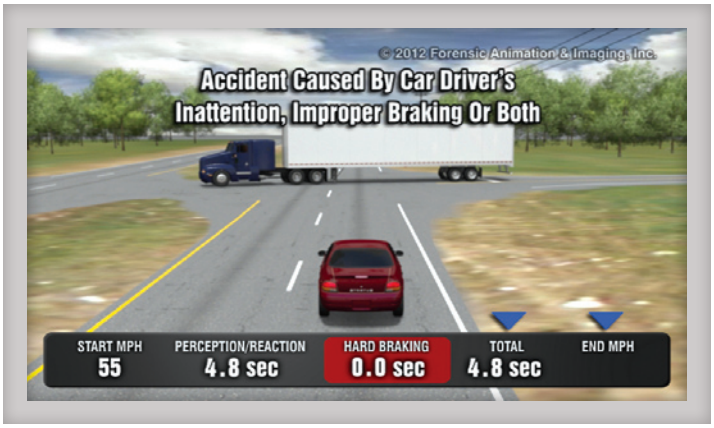

Winning By Playing Cards Face-Up

Once we have revealed the critical accident information through the bounding process, and how the information supports a credible liability defense, we can put together a visual presentation to move your bargaining opponent to a reasonable presuit settlement.

Some have said the first rule of negotiating is not believing anything anyone says. With so much bluffing going around, you may underestimate how powerful it is to have a fact-based defense for which you share the numbers and can visually demonstrate the facts. "Here is what happened, and this is what a jury will see." It's the confidence projected from playing your cards face-up (but then you already know the deck).

So we have brought a new, fair game to town.[1] With it, you can save most the ALAE now being wasted with near-trial settlements, get successful results, and pay a flat fee for getting the results. Or a contingent fee, which means it's no gamble at all. &

[1] We are at a significant disadvantage with this printed article because the bounding process and presuit presentation output are all animation-based. If you are interested in learning more, please contact me to see an online presentation that will include everything.

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PACA, as originally drafted, left sellers and suppliers of agricultural commodities as unsecured creditors who received little protection in any suit for recovery of damages where a buyer had failed to make payment required by contract.[4] As a result, sellers and suppliers of agricultural commodities often recovered, if at all, only after banks and other lenders with secured interests in the inventories, proceeds, and receivables of the defaulting buyer.[5]

Finding such financing arrangements contrary to public interest,[6] Congress amended PACA in 1984 to establish a statutory trust for the benefit of unpaid sellers and suppliers of agricultural commodities. Specifically, § 499e(c) provides that:

> Perishable agricultural commodities received by a commission merchant, dealer, or broker in all transactions, and all inventories of food or other products derived from perishable agricultural commodities, and any receivables or proceeds from the sale of such commodities or products, shall be held by such commission merchant, dealer, or broker in trust for the benefit of all unpaid suppliers or sellers of such commodities or agents involved in the transaction, until full payment of the sums owing in connection with such transactions has been received by such unpaid suppliers, sellers, or agents.

With the amendment, Congress imposed a non-segregated "floating" trust made up of perishable agricultural commodities received in all transactions, all inventory of food or other products derived from such commodities, and all receivables or proceeds from the sale of such commodities.[7]

The PACA trust commences upon acceptance of delivery of the commodities by the buyer and continues for the benefit of the buyer's unpaid seller until paid in full.[8] Stated simply, a PACA trust is established for the benefit of all sellers upon the buyer's buying and selling agricultural commodities and exists throughout the life of the

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buyer's business until all beneficiaries of the trust are paid in full.[9]

The "floating" aspect of the trust arises in that it extends to all of a firm's commodity-related liquid assets, under which there may be a commingling of assets.[10] Accordingly, there is no necessity for a seller or supplier to specifically identify all of the trust assets through each step of the accrual and disposal process.[11] Ultimately, the burden is on the buyer to establish which, if any, assets are not subject to the PACA trust.[12]

Because PACA creates a trust in favor of sellers and suppliers, any assets included in the PACA trust are not included in the bankruptcy estate of an insolvent buyer.[13] As a result, PACA trust beneficiaries generally take priority ahead of secured creditors, administrative claims, and other priority and general unsecured creditors.[14] In some instances, PACA trust beneficiaries have been permitted to trace and recover assets transferred from the trustee to third parties in dissipation of the trust.[15]

Notwithstanding the broad protections of the PACA trust, a transaction must first meet the requirements of PACA in order for sellers and suppliers to receive the benefits of the trust. For example, the PACA trust is limited to transactions involving a "perishable agricultural commodity,"[16] which is defined as "fresh fruits and vegetables of every kind and character... whether or not frozen or packed in ice."[17] Unprocessed or very minimally processed fruits and vegetables constitute perishable agricultural commodities so long as the processing does not change the essential nature of the item or is meant to temporarily preserve it.[18]

In addition, the transaction must have occurred in interstate or foreign commerce[19] and the purchaser of the commodities must be either a "dealer," "commission merchant," or "broker."[20] Under PACA, a "dealer" is a person who buys or sells perishable agricultural commodities,[21] a "commission merchant" is a person who receives for sale perishable agricultural commodities on behalf of another,[22] and a "broker" is a person who negotiates sales of perishable agricultural commodities on behalf of the seller or buyer.[23]

Further, PACA is applicable only to transactions with short-term credit arrangements.[24] Specifically, the credit arrangement must require payment within thirty days after delivery of the commodities.[25] As a result, the best practice is for sellers and suppliers to formalize short-term credit arrangements in writing by explicitly stating the thirty-day time for payment.

In all instances, however, a seller or supplier of perishable agricultural commodities must preserve their trust rights to become PACA trust beneficiaries. A preservation of rights may be accomplished by providing written notice to the buyer within thirty days after expiration of the time payment is due, a time negotiated by the parties, or the time the seller or supplier receives notice the payment instrument that was presented was dishonored.[26] Alternatively, PACA licensees may preserve their rights by including certain language in its sale agreement or invoice that provides the buyer notice of its intent.[27]

With the enactment of PACA and its trust provisions, Congress provided sellers and suppliers of agricultural commodities a powerful device for collection of unpaid amounts in connection with the sale and purchase of such commodities. Too frequently, however, the complexities of this legislation and its governing case law have resulted in a loss or waiver of the full benefits and protections of the PACA Trust.

This article provides a general overview of the PACA trust, and is the first in a series intended to explain and illustrate key issues facing sellers and suppliers of perishable commodities. In the meantime, we invite you to contact our office with any questions regarding a specific issue or circumstance. &

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PACA TRUST

[1] Brian K. Mathis is an associate with Taylor & Associates, Attorneys At Law, P.L.

[2] Bocchi Americas Assoc. v. Commerce Fresh Mktg., Inc., 515 F.3d 383 (5th Cir. 2008).

[3] H.R. Rep. No. 84-1196, S. Rep. No. 84-2507, at 2 (1955).

[4] H.R. Rep. No. 543 (1983).

[5] Endico Potatoes, Inc. v. CIT Group/Factoring, Inc., 67 F. 3d 1063 (2d Cir. 1995).

[6] 7 U.S.C. 499e(c)(1).

[7] 7 C.F.R. 46.46(b).

[8] Hull Co. v. Hauser's Foods, Inc. 924 F.2d 777 (8th Cir. 1991); 7 C.F.R. 46.46(d)(1).

[9] A & J Produce Corp. v. Bronx Overall Economic Development Corp., 542 F. 3d 54 (2d Cir. 2008).

[10] H.R. Rep. 98-543, at 5 (1984); 7 C.F.R. 46.46.(b).

[11] In re Atlantic Tropical Mkt Corp., 118 B.R. 139 (Bankr. S.D. Fla. 1990).

[12] See Fresh Kist Produce, LLC v. Choi Corp., Inc., 223 F.Supp.2d 1 (D.D.C. 2002).

[13] J.R. Brooks & Son, Inc. v. Norman's Country Market, Inc., 98 B.R. 47 (N.D. Fla. 1989).

[14] In re Super Spud, Inc., 77 B.R. 930 (N.D. Fla. 1987).

[15] See Endico, 67 F.3d 1063.

[16] 7 C.F.R. § 499(a)(4).

[17] 7 C.F.R. § 46.2.

[18] In re Long John Silver's Rest., Inc., 230 B.R. 29 (Bankr. Del. 1999).

[19] 7 U.S.C. 499a(b)(8).

[20] 7 U.S.C. 499a(b).

[21] 7 U.S.C. 499a(b)(5).

[22] 7 U.S.C. 499a(b)(6).

[23] 7 U.S.C. 499a(b)(7).

[24] See Bocchi, 515 F.3d at 388.

[25] 7 U.S.C. 499b(4).

[26] 7 C.F.R. 46.46(f)(1).

[27] 7 C.F.R. 46.46(f)(2) requires the invoice or billing statement contain the following statement:

The perishable agricultural commodities listed on this invoice are sold subject to the statutory trust authorized by section 5(c) of the Perishable Agricultural Commodities Act, 1930 (7 U.S.C. 499e(c)). The seller of these commodities retains a trust claim over these commodities, all inventories of food or other products derived from these commodities, and any receivables or proceeds from the sale of these commodities until full payment is received.